TEOH PENG PHE

v.

DATO' SERI DR TING CHEW PEH

HIGH COURT MALAYA, KUALA LUMPUR
MOHD HISHAMUDIN YUNUS J
[CIVIL DIVISION S5 (S3)-24-188-2002]
1 DECEMBER 2003

CIVIL PROCEDURE: *Discovery - Order for discovery under Norwich Pharmacal principle - Whether appropriate - Whether principle restricted to "mere tort" and "mere witness" cases - Whether court bound by doctrine of stare decisis - Whether plaintiff able to show cause of action against wrongdoer*

CIVIL PROCEDURE: *Striking out - Statement of claim - Whether statement of claim frivolous and vexatious - Rules of the High Court 1980, O. 18 r. 19(1)(b), (c)*

This was an appeal by the defendant against the decision of the learned senior assistant registrar dismissing the defendant's application to strike out the statement of claim on the grounds that it was frivolous and vexatious pursuant to O. 18 r. 19(1)(b) and (c) of the Rules of the High Court 1980. The plaintiff had received an official receipt from the Malaysian Chinese Association ('MCA') headquarters acknowledging payment by the "plaintiff" of a subscription of RM100 as a life member of the party. The plaintiff, fearing that someone might have used his previous identity card which he had lost a few years ago to deceive the MCA into believing that the plaintiff had applied to be a life member of the MCA, applied for an order for discovery under the *Norwich Pharmacal* principle. He sought the discovery of the identity of the person or persons who represented his name for life membership of the MCA, the proposer and seconder of the application and the person who paid the fees for the application.

Held:

[1] In the present case, it was inappropriate for the plaintiff to invoke the Norwich Pharmacal principle against the defendant for the purpose of obtaining the desired information because the plaintiff had not shown that the alleged wrongdoer *ie*, the impersonator, had committed (or might have committed) a tortious act against him. Since the plaintiff had failed to satisfy the "mere tort" requirement laid down in the Supreme Court case

of *First Malaysia Finance Bhd v. Dato' Mohd Fathi Haji Ahmad*, the plaintiff's application was frivolous and vexatious. Furthermore, this court was bound by the doctrine of *stare decisis* to follow the decision of *First Malaysia Finance (supra)*, notwithstanding that the judgment of the English Court of Appeal in *Ashworth Hospital Authority v. MGN Ltd* implies that our Supreme Court in *First Malaysia Finance (supra)*, by restricting the application of the principle to "mere tort" and "mere witness" cases, was mistaken in its interpretation of the House of Lords' judgment in *Norwich Pharmacal Co. & Ors v. Commissioners of Customs and Excise*. However, even assuming that the decision in *Ashworth Hospital (supra)* were applied to the facts of the present case, the plaintiff's application would still be refused. For, although *Ashworth Hospital (supra)* does extend the application of the Norwich Pharmacal principle to beyond tort cases, nonetheless, the decision does not extend the principle to every wrongdoing. The decision still maintains that the party invoking the principle must be able to show that he has, or might have, a cause of action against the wrongdoer. In this instance, the plaintiff was unable to show that he had a cause of action against the wrongdoer; at best, he was only able to show that the wrongdoer had committed a criminal act. (pp 242 f, 243 h, 247 c-g & 248 d)

[Appeal allowed.]

Case(s) referred to:

Ashworth Hospital Authority v. MGN Ltd [2001] 1 All ER 991 ***(refd)***

Bradford Building Society v. Borders [1941] 2 All ER 205 ***(refd)***

First Malaysia Finance Bhd v. Dato' Mohd Fathi Hj Ahmad [1993] 3 CLJ 329 SC ***(foll)***

Norwich Pharmacal Co & Ors v. Commissioners of Customs and Excise [1973] 2 All ER 943 ***(refd)***

P v. T [1997] 4 All ER 200 ***(dist)***

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19(1)(b), (c)

Other source(s) referred to:

WVH Rogers, *Winfield & Jolowicz on Tort*, 15th edn, p 354

For the plaintiff - Gideon Tan, M/s Gideon Tan Razali Zaini
For the defendant - Mohd Izral Khairy; M/s Shearn Delamore & Co

Reported by Suresh Nathan

JUDGMENT

Mohd Hishamudin Yunus J:

This is an appeal by the defendant against the decision of the learned senior assistant registrar dismissing the defendant's application to strike out the statement of claim on the grounds that it is frivolous and vexatious pursuant to O. 18 r. 19(1)(b) and (c) of the Rules of the High Court 1980.

I have allowed the appeal with costs.

The following are my grounds.

Some time in the second half of the year 2001, the plaintiff received an official receipt dated 30 June 2001 from the Malaysian Chinese Association ("the MCA") headquarters acknowledging payment by the "plaintiff" of a subscription of RM100 as a life member of the party. The receipt bore the plaintiff's name ("Teoh Peng Phe"), his identity card number, as well as his previous address. The plaintiff was puzzled: for he had never applied to be a member of the MCA. The plaintiff feared that someone might have used his previous identity card which he had lost a few years ago – and was never found – to impersonate him and to deceive the MCA into believing that he (ie, the plaintiff) had applied to be a life member of the MCA. The plaintiff also feared that his identity card might be further used for some other fraudulent purposes. Accordingly, the plaintiff did two things. First, he lodged a police report on the matter. Then, he instructed his solicitor to write to the MCA headquarters asking the latter to cancel his "membership" and to supply the following particulars:

(a) the identity of the person who had applied to be a life member of the MCA using the plaintiff's name;

(b) the name of the proposer and seconder of the application; and

(c) the identity of the person who had paid the subscription fee in respect of the application.

In reply, the MCA headquarters, by its letter of 4 March 2002, informed the plaintiff's solicitor that they had taken action to delete the plaintiff's name from the MCA membership list. However, the MCA letter ignored the request for particulars (a), (b) and (c).

The plaintiff was dissatisfied with the response from the MCA headquarters.

The plaintiff's originating summons is essentially for an order for discovery under the *Norwich Pharmacal* principle (see *Norwich Pharmacal Co. and Others v. Commissioners of Customs and Excise* [1973] 2 All ER 943). In essence, the plaintiff seeks from the defendant, as the Secretary General of the Malaysian Chinese Association, discovery of the identity of the person or persons who represented his (ie, plaintiff's) name for life membership of the MCA, as well as the proposer and seconder of the application, and the person who paid the fees for the application.

In *Norwich Pharmacal*, Lord Reid explained the scope of the principle as follows (at p. 948):

> My noble and learned friends, Lord Cross of Chelsea and Lord Kilbrandon, have dealt with the authorities. They are not very satisfactory, not always easy to reconcile and in the end inconclusive. On the whole, I think they favour the appellants, and I am particularly impressed by the views expressed by Lord Romilly MR and Lord Hatherley LC in *Upmann v. Elkan* [1871] LR 12 Eq 140, 7 Ch App 130. They seem to me to point to a very reasonable principle that if through no fault of his own, a person gets mixed up in the tortious acts of others so as to facilitate their own wrongdoing, he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense, the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitate its perpetration.

In my view, in the present case, it is inappropriate for the plaintiff to invoke the *Norwich Pharmacal* principle against the defendant for the purpose of obtaining the desired information. This is because the plaintiff in his affidavit has not shown that the alleged wrongdoer (ie, the impersonator) had committed (or might have committed) a tortious act against him.

Encik Gideon Tan, the learned counsel for the plaintiff, however, argued that the wrongdoer, by falsely representing himself as the plaintiff (ie, by using the plaintiff's name, identity card number and address), in applying to be a member of the MCA, had committed the tort of deceit (or fraud) against the plaintiff. With respect, I am unable to accept this argument. No doubt a wrong had been committed against the plaintiff by the person (whoever he might be, and whatever might be the motive) who, in applying to be a member of the MCA, had used the plaintiff's name and other personal particulars of the plaintiff. But clearly there is no basis to assert that such a wrongful act amounts to a tort of deceit (or fraud) against the plaintiff. For one thing, the fraudulent

misrepresentation was not made to the plaintiff: it was made to the MCA. It is to be remembered that in order to prove the tort of deceit (or fraud) a plaintiff must establish the following:

(a) There must be a representation of fact made by words or conduct.

(b) The representation must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which includes the plaintiff, in the manner which resulted in damage to him.

(c) It must be proved that the plaintiff has acted upon the false statement.

(d) It must be proved that the plaintiff suffered damage by so doing.

(e) The representation must be made with knowledge that it is or may be false. It must be wilfully false, or at least made in the absence of any genuine belief that it is true.

(See *Winfield & Jolowicz on Tort*, by W.V.H Rogers, 15th edn. p. 354, citing *Bradford Building Society v. Borders* [1941] 2 All ER 205 at 211.) In the present case, ingredients (b), (c) and (d) are lacking.

Now, whatever might have been the current legal position in England (and I will come to this very shortly), where the *Norwich Pharmacal* principle originated, in Malaysia, however, our Supreme Court, whether rightly or wrongly (depending how one interprets *Norwich Pharmacal*) had in a 1993 judgment confined the principle to the "mere witness" and "mere tort' rules (see *First Malaysia Finance Bhd. v. Dato' Mohd Fathi bin Haji Ahmad* [1993] 3 CLJ 329). In *First Malaysia Finance*, the Supreme Court defined the scope of the *Norwich Pharmacal* as follows (at p. 336):

> In our view, there can be no doubt that *Norwich Pharmacal* is in effect a consolidation of the early authorities on discovery, which the House had approved. We also note that the scope of *Norwich Pharmacal* is limited by the 'mere witness' and 'mere tort' rules. We would respectfully follow the principles enunciated by the House of Lords in *Norwich Pharmacal* and it was with those principles in mind that we turned to consider the particular circumstances of the present case in order to decide whether the judge was right in making the order he did in fact made.

In the present case, however, the plaintiff has failed to satisfy the "mere tort" requirement. Thus the application under the originating summons is frivolous and vexatious.

It is further submitted by Encik Gideon Tan that, in cases where it is not possible for the plaintiff to state the nature of the tort believed to have been committed by the wrongdoer against him, the court, in exceptional cases, may still make an order for discovery pursuant to the *Norwich Pharmacal* principle if the justice of the case so requires. He further submitted that the present case is an exceptional case and that the plaintiff (to quote learned counsel) "needs an order for discovery to assist the plaintiff to discover the identity of the wrongdoer and to ascertain if he has a viable cause of action in tort against the wrongdoer". Learned counsel cited the English High Court case of *P v. T* [1997] 4 All ER 200.

With respect, *P v. T* does not support counsel's argument. In this case cited, the plaintiff – unlike the plaintiff in the present case, who is unable to show the commission or possible commission of any tort against him – was able to satisfy the court that he had good reason to believe that the tort of libel or malicious falsehood had been committed against him by the wrongdoer. In that case, there is an allegation of gross misconduct against the plaintiff by someone, which allegation resulted in the plaintiff being dismissed by his employer. The plaintiff wanted to know from his employer (who refused to supply the information) who made the allegation and the nature of the allegation (of gross misconduct), with a view to bringing an action of libel or malicious falsehood against the party making the allegation. The court, invoking the *Norwich Pharmacal* principle, granted the application. Sir Richard Scott V-C ruled (at p. 209):

> For my part, I see no reason whatever why the *Norwich Pharmacal* principle should be regarded as inapplicable to assist a prospective plaintiff to obtain information and documents necessary for the bringing of an action of libel or malicious falsehood in circumstances such as exist in the present case.

Further, in the alternative, Encik Gideon Tan submitted that even if there had been no tortious act committed or might have been committed by the wrongdoer against the plaintiff, nonetheless, a wrongdoing has been shown to have been committed by someone against the plaintiff and therefore the Court ought to grant his application for discovery. Learned counsel argued that the application of the *Norwich Pharmacal* principle is not merely confined to "mere tort" situations but to other wrongdoings as well, as ruled by the English Court of Appeal in *Ashworth Hospital Authority v. MGN Ltd* [2001] 1 All ER 991.

In this case cited, the defendant newspaper company, MGN, published in one of its newspapers an article about one Ian Brady, a convicted murderer who was detained at the claimant/plaintiff hospital. The article included a series of verbatim extracts from information held on a database maintained by the

hospital's staff. Those extracts, together with additional information about Brady held on the database, had been supplied to one of the newspaper's journalists by an intermediary. The intermediary, who was paid by the journalist for the information, had himself received it, probably in exchange for payment, from a member of the hospital staff – the source – who was subject to a contractual duty of confidentiality. The journalist knew the identity of the intermediary but not that of the source. In subsequent proceedings for breach of confidence brought by the hospital against MGN, the judge made an order requiring MGN to disclose the identity of the intermediary as a means of identifying the source, whom the hospital intended to dismiss. MGN appealed, challenging the judge's discretion to make the order. In particular, it contended that the court's equitable jurisdiction to require a third party who had become involved in wrongdoing to disclose the identity of the wrongdoer against whom the claimant had a cause of action in respect of that wrong was confined to tortious conduct, and that the breach of confidence alleged by the hospital was not tortious.

Lord Phillips of Worth Matravers MR, in delivering the decision of the Court of Appeal, said (at p. 1004):

> Is *Norwich Pharmacal* jurisdiction restricted to tort?
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> 55. The wrongdoing in which the commissioners were 'mixed up' in *Norwich Pharmacal* was tortious. MGN submitted that the jurisdiction recognised in that case was one which arose only in relation to tort. If that is correct, a claimant can only invoke *Norwich Pharmacal* jurisdiction in a breach of confidence case if the breach of confidence involves tortious conduct. This it will often do. If the confidential information is in, or reduced to, hard copy form, the paper on which it is recorded will often belong to the claimant. Unauthorised transfer of the information will often involve the conversion by the source of the paper on which the information is printed.
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> 56. Mr Pleming submitted that, on the authorities, the court focuses when considering *Norwich Pharmacal* jurisdiction in a breach of confidence context, not on the breach of confidentiality but on the tortious act of the source in converting or stealing the document containing the confidential information.
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> 57. If this equitable head of jurisdiction depends upon the fortuity of whether or not a virtually valueless piece of paper on which the information is recorded belongs to the claimant, our law is in a sorry state. Do the authorities lead inexorably to this conclusion?
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> 58. The starting point must be *Norwich Pharmacal* itself. In the much quoted passage from his judgement ([1973] 2 All ER 943 at 948-949, [1974] AC 133 at 175), which I have set out earlier, Lord Reid spoke expressly of a person getting mixed up 'in the tortious acts of others' (my emphasis).

Elsewhere, however, he spoke of 'the wrongdoer'. None of the other members of the Committee suggested that the jurisdiction to order disclosure was restricted to cases of tort. Lord Morris of Borth-y-Gest spoke of 'wrongdoers' (see [1973] 2 All ER 943 at 951, 952, [1974] AC 133 at 178, 179) and of the protection of a plaintiff's 'interests' and 'rights' (see [1973] 1 All ER 943 at 951, 953, [1974] AC 133 at 178, 180). Lord Kilbrandon spoke of 'a just cause of action' (see [1973] 2 All ER 943 at 973, [1974] AC 133 at 202), 'litigious matters', 'unlawfully causing him damage' (see [1973] 2 All ER 943 at 973, [1974] AC 133 at 203), '"a *bona fide* claim"', 'infringing … rights' (see [1973] 2 All ER 943 at 975, [1974] AC 133 at 205).

59. The authorities to which Lord Reid referred and which were exhaustively analysed by other members of the Committee involved a wide variety of causes of action. They included passing off (see *Orr v. Diaper* [1876] 4 Ch D 92, 35 LT 468); liability of stockholders for debts (see *Post v. Toledo, Cincinnati and St Louis Railroad Co* [1887] 11 NE Rep 540) and interference with proprietary rights that might involve breach of contract (see *Moodalay v. Morton* [1785] 1 Bro CC 469, 28 ER 1245).

60. In none of these cases did the precise nature of the alleged infringement of the plaintiff's rights appear to have been material, nor did any member of the Committee draw any distinction between them on that basis (see, in particular, *Norwich Pharmacal Co v. Customs and Excise Comrs* [1973] 2 All ER 943 at 968, [1974] AC 133 at 197 per Lord Cross of Chelsea).

61. I can see no basis in principle for confining *Norwich Pharmacal* to cases involving tort. On the contrary the principle in *Norwich Pharmacal* should be one of general application. Under it jurisdiction to order disclosure of the identity of wrongdoers should exist in equity wherever the person against whom disclosure is sought has got 'mixed up' in wrongful conduct that infringes a claimant's legal rights. That general principle emerges from the judgments of Lord Morris, Viscount Dilhorne, Lord Cross and Lord Kilbrandon. I do not believe that Lord Reid's reference to 'tortious acts' was any more than a reflection of the fact that the relevant wrongdoing in *Norwich Pharmacal* was tortious.

62. Do the authorities preclude extending *Norwich Pharmacal* jurisdiction beyond the field of tort? We have been referred to a number cases in which the jurisdiction was invoked in cases which involved tort: *British Steel Corp v. Granada Television Ltd* [1982] 1 All ER 417, [1981] AC 1096; *X Ltd v. Morgan-Grampian (Publishers) Ltd* [1990] 2 All ER 1, [1991] 1 AC 1 and *Ricci v. Chow* [1987] 3 All ER 534, [1987] 1 WLR 1658. In each of these, express reference was made to the fact that the wrongdoing in respect of which the jurisdiction was invoked was tortious. I do not consider, however, that any of them precludes this court from applying the principle in *Norwich Pharmacal* more widely. We have been referred to no decision which has held, in terms, that the principle is restricted to cases involving tort.

It is clear from the above passage that the English Court of Appeal had embarked on an in-depth analysis of the judgment of the House of Lords in *Norwich Pharmacal* and gave its own interpretation of that judgment. Having so analysed, the Court of Appeal arrived at the conclusion that the *Norwich Pharmacal* principle, as enunciated by the House of Lords, is not confined merely to tortious acts but is applicable to other wrongdoings as well; that is to say, it is of general application. It is to be noted, however, that such an interpretation differs with the interpretation of *Norwich Pharmacal* as given by our Supreme Court in *First Malaysia Finance* eight years ago. On my part, I share the view of the English Court of Appeal that it is difficult to justify restricting the *Norwich Pharmacal* principle only to cases involving tortious conduct. Thus, in the interest of justice, I welcome the extension of the principle by the Court of Appeal in *Ashworth Hospital*. However, be that as it may, I am with agreement with the submission of Encik Izral Khairy, the learned counsel for the defendant, that I am bound by the doctrine of stare decisis to follow the decision of our Supreme Court in *First Malaysia Finance*, notwithstanding that the judgment of the English Court of Appeal in *Ashworth Hospital* implies that our Supreme Court in *First Malaysia Finance*, by restricting the application of the principle to "mere tort" and "mere witness" cases, was mistaken in its interpretation of the House of Lords' judgment in *Norwich Pharmacal.* But I earnestly and respectfully hope that it would not be long before our Federal Court is presented with the opportunity of reconsidering *First Malaysia Finance* with a view to developing the law on the subject bearing in mind the judgment in *Ashworth Hospital*.

I think I should add that, even assuming that I were to apply the decision in *Ashworth Hospital* to the facts of the present case (putting aside the doctrine of binding precedent for the moment), I still would have to refuse the plaintiff's application. For, although *Ashworth Hospital* does extend the application of the *Norwich Pharmacal* principle to beyond tort cases, nonetheless, the decision does not extend the principle to every wrongdoing. The decision still maintains that the party invoking the principle must be able to show that he has or might have a cause of action against the wrongdoer. In *Ashworth Hospital* the Court of Appeal said (to repeat):

> Under it jurisdiction to order disclosure of the identity of wrongdoers should exist in equity wherever the person against whom disclosure is sought has got 'mixed up' in wrongful conduct that infringes a claimant's legal rights.

In *Ashworth Hospital* the Court of Appeal placed great importance on the fact that the plaintiff was able to show to the court that he has a claim in equity against MGN, the intermediary and the source for breach of confidence, and a cause of action in contract against the source. At para. 63 of the Court of Appeal's judgment it is stated:

63. In the present case the source abstracted information from the PACIS database which he or she transmitted to the intermediary in breach of confidence and in breach of contract. The intermediary, knowing that the information had been obtained in breach of confidence, passed it to MGN, through Mr. Jones. MGN, knowing that the information had been transferred in breach of confidence, published extracts from it. In these circumstances, claims for breach of confidence lie against MGN, the intermediary and the source. The basis of those claims was explored by the House of Lords in *A-G v. Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545, [1990] 1 AC 109. As against the source the claim can be brought in contract. As against all three it lies in equity (see [1988] 3 All ER 545 at 645, [1990] 1 AC 109 at 261 per Lord Keith of Kinkel [1988] 3 All ER 545 at 648, [1990] 1 AC 109 at 268 per Lord Griffiths and [1988] 3 All ER 545 at 658-659, [1990] 1 AC 109 at 281-282 per Lord Goff of Chieveley).

In the case now before me, however, the plaintiff is unable to show that he has a cause of action against the wrongdoer; at best, he was only able to show that the wrongdoer has committed a criminal act.